RECEIVED
JUN 29 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-6932

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1980

JAMES EDWARD CLAYTON,

Petitioner,

- Versus -

W. J. ESTELLE, Jr., Director,
Texas Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BY: JAMES EDWARD CLAYTON
Conner's Correctional Center
Star Route B, Box 220
Hominy, Oklahoma 74035

I N D E X

PAGE NUMBER

MOTION TO PROCEED IN FORMA PAUPERIS	i
AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	ii
CONSTITUTIONAL PROVISIONS	iii
OPINIONS BELOW	1
JURISDICTION	1
HISTORY OF THE CASE	2
QUESTIONS PRESENTED	2-3
STATEMENT OF THE CASE	3-4
RESTATEMENT OF QUESTION ONE PRESENTED	4
ARGUMENT AND AUTHORITIES	4-6
RESTATEMENT OF QUESTION TWO PRESENTED	6
ARGUMENT AND AUTHORITIES	6-8
RESTATEMENT OF QUESTION THREE PRESENTED	8
ARGUMENT AND AUTHORITIES	8-9
RESTATEMENT OF QUESTION FOUR PRESENTED	9
ARGUMENT AND AUTHORITIES	9-10
CONCLUSION	10
CERTIFICATE OF SERVICE	10

IN THE UNITED STATES SUPREME COURT

NO. _____

JAMES EDWARD CLAYTON,

Petitioner,

-Versus-

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW JAMES EDWARD CLAYTON, known herein as Petitioner and moves this Honorable Court for permission for leave to proceed in forma pauperis in this action -- Petition for Writ of Certiorari -- without being required to prepay costs and fees therefore. In support therefore Petitioner submit attached hereto his Affidavit in support thereof.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Honorable Court grant him leave to proceed in forma pauperis in all things in this action.

Respectfully submitted,

JAMES EDWARD CLAYTON
CONNOR'S CORRECTIONAL CENTER
STAR ROUTE B, P. O. Box 220
Hominy, Oklahoma 74035

IN THE UNITED STATES SUPREME COURT

NO. _____

JAMES EDWARD CLAYTON,

Petitioner,

-Versus-

W. J. ESTELLE, JR., Director,
Texas Department of Corrections

Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

BEFORE ME, ON THIS DATE AFFIXED HERETO, personally appeared JAMES EDWARD CLAYTON, who, being first, by me, duly sworn, upon his oath, deposes and says:

1. That I am the petitioner herein;
2. That I believe I am entitle to the redress which I seek;
3. That I do not have funds to pay for costs of the record or for the appointment of Counsel to assist in the prosecution of this action;
4. That I do not have family, friends or sedurity to assist in the prosecution of this action;
5. That I have proceedin thus far in the lower courts in all things in forma pauperis without the assistance of counsel;
6. That I believe I am entitle to Certorari in this cause for the reasons setforth in the attached Petition for Writ of Certorari.
7. That I am unable to finance the prosecution of this cause due to indigency, nor do I have security to give therefore.

Further sayeth not affaint: James Edward Clayton

JAMES EDWARD CLAYTON

SWORN AND SUBSCRIBED TO, BEFORE ME,

on this 17 day of June, 1981, to certify which witnesseth my hand and seal of office.

William [illegible]

NOTARY PUBLIC

MY COMMISSION EXPIRES:
2/22/84.

ARTICLE V
Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; [1] nor shall private property be taken for public use, without just compensation.[2]

ARTICLE VI
Criminal Proceedings (continued)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE XIV[2]
Civil Rights: Apportionment of Representatives: Political Disabilities: Public Debt

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizins of the United States and of the state wherein they reside.[1] No state shall make or enforce any law which shall abridge the privleges or immunities of citizens[2] of the United States; nor shall any state deprive any person of life, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

NO. _____

IN THE UNITED STATES SUPREME COURT

JAMES EDWARD CLAYTON,
Petitioner,

-Versus-

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW JAMES EDWARD CLAYTON, known herein as Petitioner and moves this Honorable Court to grant a Petiton for Writ of Certorari to the United States Court of Appeals for the Fifth Circuit. In support pettioner would show unto the Court as follows:

OPINIONS BELOW

In November (22nd) of 1978 the District Court of Dallas County, Texas, denied petitioner's post conviction pleadings, without a hearing, which was affirmed in an unreported opinion -- Writ No. 2563 -- by the Texas Court of Criminal Appeals. Thereafter, petiiioner brought habeas corpus proceedings in the United States District Court, Northern District of Texas, Clayton v. Estelle, CA-3-80-760-D. The District Court upon findings, Conclusions and Recommendations of the United States Magistrate, without a hearing, denied relief and adopted the magistrate's recommendations as its own. See Appendixes A and B. The Court subsequently denied a Certificate of Probable Cause to Appeal, Appendix C, which was affirmed by the United States Court of Appeals for the Fifth Circuit. See Appendix D.

JURISDICTION

This Honorable Court has jurisdiction to hear the instant action by way of judicial discretion and under Title 28 U.S.C. Section 1254 and Section 1257. Constitutional questions are presented which are of grave interest to the public at large. The resolution of the issues in this case by this Court would clarify the law in these important constitutional areas. Based upon the foregoing it is respectfully submitted that on the facts of this individual case and the impact which a resolution of the matter would have on the entire criminal justice system certiorari should be granted in this case.

HISTORY OF THE CASE

Petitioner, James Edward Clayton, was arrested April 26, 1970, and convicted in C-70-3928-IL and sentenced to sixty (60) years on March 18, 1971, for the offense of Robbery. This conviction was reversed by the Texas Court of Criminal Appeals, Clayton v. State, Tex. Cr., 502 S. W. 2d 755 (1973). Also, pending were two (2) untried charges of Robbery -- C-70-3277-IL and C-70-3278-IL. After numbered attempts to secure a trial on the pending charges (see OC-488, Clayton v. Gossett, Judge, Supreme Court of Texas), petitioner entered Federal Court to secure a "speedy trial and appointment of counsel" which was granted by order of Honorable Judge Sarah T. Hughes in Clayton v. Jones, CA-3-5476-B (unreported). Consequently, trials and appeals were had and are reported. Clayton v. State, Tex. Cr., 499 S. W. 2d 176 (1973).

Hence came on a second trial in C-70-3928-IL in which petitioner entered a plea of guilty. Post-conviction pleadings commenced and ended without a hearing in an unreported case, Clayton v. Estelle, CA-3-1091-B, Affirmed in part, Clayton v. Estelle, 5th Cir.1976, 541 F. 2d 486, cert. denied at 431 U.S. 918 (1977). While the foregoing application was pending in the Court below a new petition was commenced alleging denial of effective assistance of counsel. This was denied. see, Clayton v. Estelle, U.S. Dist. Ct., No. 76-411-B, and appeal dismissed May 9, 1977, with certorari denied on October 11, 1977 (the reason for denial being conclusionary allegations).

Petitioner after securing such evidence as deemed necessary commenced the instant pleading in the trial court, which was denied without a hearing. On appeal, in Writ No. 2563, the Texas Court of Criminal Appeals affirmed the denial. In Federal Court the District Court again denied without a hearing. Clayton v. Estelle, No. CA-3-80-760-D). Certificate of Probable Cause was denied by the Fifth Circuit Court of Appeals (81-9026).

QUESTIONS PRESENTED

I. WHETHER THE COURTS BELOW CORRECTLY HELD PETITIONER WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON HIS CONSTITUTIONAL CLAIMS?

II. WHETHER THE CONSIDERATION OF CONVICTIONS VOID UNDER GIDEON V. WAINWRIGHT, AT THE TIME OF SENTENCING, WAS IMPROPER REQUIRING RESENTENCING UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS?

III. WHETHER THE CONSIDERATION OF MISINFORMATION REQUIRES THE TRIAL COURT TO RESENTENCE PETITIONER WITHOUT CONSIDERATION OF THE MISINFORMATION AT THE TIME OF IMPOSING THE SENTENCES IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS?

IV. WHETHER PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FACTS OF THIS CASE CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS.

STATEMENT OF THE CASE

The facts revelant to Petitioner's first question are essentially stated under the History of the Case reflecting that a hearing was not conducted in the lower Courts.* Facts and evidence show the Petitioner is entitle to a hearing on his claims. By reference thereto petitioner adopts the facts under the History of the Case as if the same were set-forth herein in all things.

Petitioner entered his pleas of guilty in State Court. At the time of Plea-Negotations (his) prior convictions became a pivotal point and were accorded consideration by the prosecutor and trial judge in determining the penalty to be assessed.**

In the prior convictions taken into consideration during plea-negotations the petitioner did not have the assistance of counsel, did not knowingly, intelligently and voluntarily waive the assistance of counsel. Petitioner was not advised of his right to counsel and that if he was indigent that counsel would be appointed to him at no cost. Petitioner did not know of his right to the assistance of counsel at the time of his trial -- in the prior convictions -- or appeals. The Court records, Judgments and Sentences, in the prior convictions show that petitioner appeared "in person", without counsel.

---

*See Affidavits of Melvin Carson Bruder, Attorney; Ida Bell Thomas; Collie Thomas; Billy Joe Pingleton; and, Myrtle Pingleton.

**Petitioner has never been afforded an evidentiary hearing in State Court or Federal Court to present evidence in support of his claims. No record has ever been developed and they have not been challenged below.

Affidavits and Court Records evidence the "specific consideration" of unverified and false information being considered. Moreover, Affidavit of Melvin Carson Bruder, Attorney, reflects consideration of "several prior robbery convictions in Oklahoma." Petitioner has no prior robbery convictions in Oklahoma -- as reflected by the record. See, Ex Parte Clayton, Criminal District Court Number Five (5), Dallas County, Texas, No. 294-L, January 14, 1976.

Counsel for the petitioner at the time of his State Court convictions did not investigate the facts of the case and law relevant to the crimes, did not determine the validity of the misinformation or prior convictions given "specific consideration" at the time of plea-negotations, nor did he interview witnesses or determine potential defenses available to the accused.

I. WHETHER THE COURTS BELOW CORRECTLY HELD PETITIONER WAS NOT ENTITLE TO AN EVIDENTIARY HEARING ON HIS CONSTITUTIONAL CLAIMS?

ARGUMENT AND AUTHORITIES

The petitioner herein acts and initiated all proceedings pro se, in the Courts below and seeks a "measure of tolerance", Gibbs v. Burke, 337 U.S. 773, 779 (1949), acting in his own behalf. United States v. Glass, 317 U.S. 200, 204 (1963). Petitioner seeks the measure of tolerance stated in Price v. Johnson, 334 U.S. 266, at 292, that:

> Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we can not impose on them the same high standards of the legal act which we might place on the members of the legal profession.

While not controlling per se Stone v. Powell, 428 U.S. 465 (1976), is authority that the District Court should have granted an evidentiary hearing to resolve the facts -- on challenge -- in this case.

The petitioner filed his allegations of the claim of ineffective assistance of counsel in a prior proceeding, Clayton v. Estelle, CA-3-76-0411-B, but the court dismissed that action on the grounds that the allegations were

"conclusionary". Compare, Sanders v. United States, 373 U.S. 1, at 15 (1963). After gathering evidence to refute the files and records petitioner reapplied on this ground with facts and evidence which mandated a hearing. A hearing was in order to resolve disputed facts on this claim alone. Townsend v. Sain, 372 U.S. 293, at 312-313 (1963). The Court in Townsend, supra, recognized:

> To be sure, the state court record is competent evidence (footnote omitted), and either party may chose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues. 372 U.S. 293, at 322 (1963).

Petitioner could not bring this claim, once discovered, in his pleading, already pending in the Federal Courts. Exhaustion of State remedies is a prerequisite. Compare, Paprskar v. Estelle, 5th Cir. 612 F. 2d 1003, 1004-1005, footnote 7 (1980). Thus, in this case, be it a successive petition case, Sanders, supra, controls with the admonishment stated therein. (Attention is directed to the case history of Townsend, Fay v. Noia, 372 U. S. 391 (1963) and Sanders, supra, discussed in HABEAS CORPUS AND POST CONVICTION REVIEW, 33 F.R.D. 363.) The claims advanced have never been heard on their merit in any court, state or federal. In view of the newly discovered evidence a hearing should have been held in the lower courts at some point. Townsend v. Sain, supra.

It is not novel that identical grounds may often be proven by different factual allegations or different legal arguments. Wilson v. Cook, 327 U.S. 474; Dewey v. Des Moines, 173 U.S. 193. See and compare, Motley v. United States, 230 F. 2d 110 (5th Cir. 1956) and Hallowell v. United States, 197 F. 2d 926 (5th Cir. 1952).

The fact remains that two clearly distinguishable issues have never been ruled on in the lower courts, which have never been presented to any court on any other pleading and that these points contain merit which based on the record indicate relief should be granted. Burgett v. Texas, 389 U.S. 109 (1969); Tucker v. United States, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736

Based on the foregoing an evidentiary hearing was required on the constitutional claims advanced in the Courts below.

II. WHETHER THE CONSIDERATION OF CONVICTIONS VOID UNDER GIDEON V. WAINWRIGHT, AT THE TIME OF SENTENCING, WAS IMPORPER REQUIRING RESENTENCING UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS?

ARGUMENT AND AUTHORITIES

During plea-negotations and leading up to the pleas of guilty, convictions and sentences, in all three (3) cases, petitioner's prior conviction(s) became a pivotal point on the issue of plea-bargaining and punishment. These same convictions were thus given "specific consideration" in imposing sentence. Appendixes A-J in the lower courts evidenced this. This has never been denied by the state.

In essence, the petitioner alleged and proved by record evidence, that he was not represented by counsel, was indigent, did not knowingly, intelligently and voluntarily waive counsel and did not know of, nor was he advised of, his right to counsel, at his trial(s) and appeal(s) in the prior convictions. The records, copies of the Judgments and Sentences, in the prior conviction(s), recite appearance at the time of trial(s) by the prosecutor and "the defendant in person." It is a maxim of law that:

> Where the record of a prior conviction is silent as to the presence of counsel, its presumed that the Sixth Amendment Rights of the defendant have been violated. The Government must affirmatively prove otherwise. (citations omitted) United States v. Lufman, 457 F. 2d 165, at 186 (7th Cir. 1972)

There is a presumption of regularity which attaches to the records. Burgett v. Texas, 389 U.S. 109, at 114-115 (1969). The State having used the prior convictions must now stand by them. Craig v. Beto, 458 F. 2d 1358 (5th Cir. 1972).

In Kitchen v. Smith, 401 U.S. 847 (1971), cited in Loper v. Beto, 405 U.S. 473 (1972), petitioner did not have counsel due to indigency. In Loper, supra, the Court remarked:

> That the petitioner on collateral review had sufficiently 'proven he was without counsel due to indigency at the time of his (1944) conviction' even though ... the petitioner introduced no evidence other than his own testimony. 405 U.S. at 860, footnote 6.

The Court in Kitchen, supra, continued:

> . . . (T)his Court has said, however,'(I)t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' Carnley v. Cockran, 369 U.S. 506, 513, 82 S.Ct. 883, 8 L.Ed. 2d 70 (1962). This applies to guilty pleas as well as to trials. (citations omitted). 405 U.S. at 848.

The records and evidence, shift to the State the burden to come forward with evidence that the accused was offered counsel and intelligently, voluntarily and understandly rejected counsel. Burgett, supra. Without an intelligently and voluntarily made waiver a silent record is presumed to be correct. Boyd v. Dutton, 405 U.S. 1 (1972). In Carnley v. Cochran, supra, the Court remarked:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

An invalid conviction may not be used to impeach a defendant, Loper v. Beto, supra, or to support guilt, or enhance penalty, Greer v. Beto, 384 U. S. 269 (1966); Burgett, supra; Tucker, supra, whether before the Court, Tucker, supra; Townsend v. Burke, 334 U.S. 736 (1948); Davis v. Wainwright, 462 F. 2d 1354 (5th Cir. 1972), or the Jury, Burgett v. Texas, supra.

In United States v. Tucker, Mr. Justice Stewart, speaking for the Court remarked:

> (F)or we deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke, . . . 'this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.' Id., at 741, 68 S.Ct. at 1255. The record in the present case makes evident that the sentencing judge gave specific consideration to the... previous convictions before imposing sentence upon him. 92 S. Ct. at 590-592.

The Court in Tucker, supra, went on to evaluate whether the sentence "might have been different if the sentencing judge had known that at least" two of the defendants' "previous convictions had been unconstitionally obtained." 404 U.S. at 448.

Tuckers' case involved that aspect of Burgett that prohibited the use of invalid convictions for enhancement. The same principle was setout in regard to guilty pleas in Townsend v. Burke, supra, Burgett was decided upon the same principle leading to the Courts' decision in Gideon --that a criminal defendant must not be made to suffer anew from violation of his constitutional guaranteed right to counsel. The Court stated in Burgett that use of prior convictions, void under Gideon, against a defendant "either to support guilt or enhance punishment . . . is to erode the principle of that case." The same principle applies with equal force to the instant case. The erosion of Gideon is the same and just as flagrant in this case as in Burgett and Tucker. For here, the only reason for the prior convictions, void under Gideon, entering the picture was to enhance.

Under the harmless error concept, Chapman v. California, 386 U.S. 18 (1972), the Court must be satisfied, and respondent must prove "beyond a reasonable doubt" that the error did not contribute to the punishment which petitioner received. Burgett v. Texas, 92 S. Ct. at 262.

It is respectfully submitted that the principles of Gideon, Burgett, Tucker and Townsend v. Burke, apply with full forced in this case and that review should be granted on this issue.

III. WHETHER THE CONSIDERATION OF MISINFORMATION REQUIRES THE TRIAL COURT TO RESENTENCE PETITIONER WITHOUT CONSIDERATION OF THE MISINFORMATION AT THE TIME OF IMPOSING THE SENTENCES IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS?

ARGUMENT AND AUTHORITIES

In Appendixes attached to the original pleadings, C,D,I, and J, --and basically the foregoing invalid convictions -- misinformation is admittedly

uncontested as being considered at the time of sentencing. Consideration of misinformation in Townsend v. Burke, supra, prompted the Court to reverse as was the consideration of such misinformation in Tucker. In Townsend v. Burke, supra, the Court stated:

> We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving. 334 U.S. at 740.

See lower Court cases cited in the petitioner's brief in the lower courts.

IV. WHETHER PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FACTS OF THIS CASE CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS?

It is a basic rule of American Jurisprudence that a conviction, felony or misdemeanor, is invalid if it was obtained in a court in which the defendant was not represented by an attorney. Gideon v. Wainwright, 372 U.S. 335 (1963); Argingsinger v. Hamlet, 407 U.S. 25 (1973). This right to counsel has been held to mean the guiding hand of counsel. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). This has been held to mean the guiding hand of counsel at all stages of the proceedings where material rights of the accused may be affected. The "effective assistance" of counsel has been interpreted to mean not errorless counsel, but counsel reasonably likely to render and rendering reasonably effective assistance. McKenna v. Ellis, 5th Cir., 280 F. 2d 592, 599 (1960).

An indigent accused is entitle to the effective assistance of counsel. Any experienced trial lawyer knows that a purported trial, without adequate preparation amounts to no trial at all. Michel v. Louisiana, 350 U.S. 91 (1955). In Von Moltke v. Gilles, 332 U.S. 708, Mr. Justice Black, observed:

> Undivided allegiance and fruitful devoted service to a client are prized traditions of the American Lawyer. It is this kind of service for which the Sixth Amendment makes provisions. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer . . . . 332 U.S. at 725 - 726.

Naturally this contemplates that counsel has an opportunity to aquaint himself with the law and facts of the case and is allowed the

opportunity to consult with the defendant. The court in Von Moltke, supra, remarked:

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and law involved and then to offer his informed opinion . . . . 332 U.S. at 721.

Counsel should discuss fully potential strategies and tactical choices with his client and be prepared to present them to the jury or court in the light most favorable to his client. Willis v. Hunter, 10th Cir., 177 F. 2d. 721 (1948). See cases listed in petitioner's Brief in the State Court, page 20-21.

In this case Counsel totally failed to investigate the law or facts surrounding the case and the applicable law relevant thereto, nor did counsel determine the valid nature of the prior convictions used to enhance the penalty in the cases. See, Jiminez v. Estelle, 5th Cir., 557 F. 2d 506 (1977). Under McMann v. Richardson, 397 U.S. 759 (1970) and Tollett v. Henderson, 409 U.S. 912 (1973), it is submitted the showing that counsel fell below the advice of counsel and the derelictions of counsel are of sufficient detrimental nature to invalidate the pleas in this case.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Honorable Court grant Certoriari in this case and remand this case to the Fifth Circuit Court of Appeals.

Respectfully submitted,

JAMES EDWARD CLAYTON
CONNER'S CORRECTIONAL CENTER
Route Star B, Box 220
Hominy, Oklahoma 74035

C E R T I F I C A T E O F S E R V I C E

This is to certify that on this 16 day of June, 1981, that a true and correct copy of the foregoing Petition for Writ of Certorari has been deposited in the U.S. MAILS, Postage prepaid, addressed to:

Gilbert Pena, Assistant Attorney General
State Capitol Building
Austin, TX

JAMES EDWARD CLAYTON

APPENDIX A

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT 8 1980
JOSEPH McELROY, JR., CLERK
BY R Edmiston
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES EDWARD CLAYTON	)	
	)	
	)	
VS.	)	CA3-80-760-D
	)	
	)	
W. J. ESTELLE, DIRECTOR, TDC	)	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the Petitioner's application be, and it is hereby, dismissed pursuant to the provisions of Rule 9(b), Rules Government §2254 Cases.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this order and the order adopting the Findings, Conclusions and Recommendation of the United States Magistrate, to Petitioner and Respondent.

SIGNED AND ENTERED this 8th day of Oct., 1980.

Robert Hill
UNITED STATES DISTRICT JUDGE

APPENDIX
5 PAGES

FILED

SEP 3 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES R. McELROY, JR., CLERK
BY Nancy Smith
Deputy

JAMES EDWARD CLAYTON)
)
VS.) CA3-80-760-D
)
W. J. ESTELLE, DIRECTOR, TDC)

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for Writ of Habeas Corpus relief filed by a State inmate pursuant to 28 U.S.C. §2254.

Parties: Petitioner is presently an inmate confined in the Oklahoma State Penitentiary at McAlester, Oklahoma, under a sentence imposed by an Oklahoma State court on one or more robbery convictions. On July 18, 1979, the Texas Department of Corrections filed a detainer against the Petitioner in the form of a Parole Violator's Warrant arising out of the Petitioner's convictions in Causes No. C-70-3277-L and C-70-3278-L which convictions were imposed by the Judge of Criminal District Court No. 5 of Dallas County, Texas. Petitioner is "in custody" on these convictions pursuant to the provisions of 28 U.S.C. §2254.

Respondent is the Director of the Texas Department of Corrections.

Statement of the Case: The Petitioner entered pleas of guilty to the charges of robbery in Cause No. C-70-3277-L and C-70-3278-L on May 18, 1970, pursuant to a plea bargain entered into by Petitioner's counsel and the prosecutor. As part of the

plea agreement he was sentenced to a term of twenty years in each case with the sentences to run concurrently. Prior to the entry of these pleas of guilty the Petitioner had been tried and convicted for the offense of robbery by assault pursuant to an indictment returned in Cause No. C-70-3928-IL and had been assessed a sentence of sixty years. This conviction had been appealed and was reversed by the Texas Court of Criminal Appeals in Clayton v. State, 502 S.W.2d 755 (Tx.Crim. App. 1973). After reversal of the conviction the Petitioner entered a plea of guilty to that charge also under a plea agreement. The trial court imposed a term of twenty years in this case and ran it concurrently with his convictions in the prior cases to which he entered pleas of guilty.

In the present application Petitioner alleges the following grounds for relief:

1. Petitioner's attorney rendered ineffective assistance of counsel.

2. The trial court improperly considered invalid prior sentences in determining the Petitioner's guilt and sentence.

3. The trial court improperly considered other incorrect information in determining the Petitioner's guilt and sentence.

The Petitioner appealed his convictions in Causes No. C-70-3277-L and C-70-3278-L, and the Texas Court of Criminal Appeals affirmed the convictions in Clayton v. State, 493 S.W.2d 176 (Tx.Crim.App. 1973). In addition, Petitioner has filed five State applications for habeas corpus relief pursuant to Article 11.07 of the Texas Code of Criminal Procedure. In each instance relief has been denied by the Court of Criminal Appeals.

The present application is Petitioner's fourth petition filed in the United States District Court for the Northern District of Texas, and is his third application collaterally attacking his sentences pursuant to §2254.

Pursuant to this Court's Show Cause Order the Respondent has filed his Motions to Dismiss and Answer. He urges that Petitioner's application be dismissed under Rule 9(b) of the Rules Governing §2254 Cases urging that the Petitioner's application constitutes an abuse of the Writ, and alternatively moves the Court to dismiss pursuant to Rule 9(a) of the Rules Governing §2254 Cases on the basis that the Respondent has been prejudiced in his ability to respond by the delay in the Petitioner's filing of his application. As a second alternative the Respondent urges that Petitioner's application be dismissed because he fails to raise claims upon which relief can be granted.

Findings and Conclusions: In his present application as well as his two former §2254 applications (CA3-74-1091-B, affirmed Clayton v. Estelle, 541 F.2d 486 (5th Cir. 1976) cert. den. 431 U.S. 918 (1977) and CA3-76-411-B) the Petitioner seeks to vitiate the legal effect of his pleas of guilty. The Petitioner in both prior Federal applications has attacked the quality of counsel which his trial attorney afforded him. Although he now raises a third variation of his claim of ineffective assistance of counsel, I am of the opinion that his first ground for relief should be dismissed under Rule 9(b), supra, as constituting a successive petition on the same ground for relief which has previously been determined on the merits. Alternatively, I am of the opinion that not only his first ground, but his second and third grounds as well, should be dismissed under the second part of Rule 9(b), supra, as constituting an abuse of the Writ.

The Petitioner's sole justification for having failed to assert the specific grounds presently raised in a former application is his claim that he was unaware of such grounds when he filed his prior petitions. No change in the decisional law of the Fifth Circuit has occurred during the interim between

the filing of the present application and the filing of his application in CA3-76-411-B. Unquestionably the manner in which the Petitioner's trial attorney represented him was known to him at the time he entered his pleas of guilty and was sentenced. By the same token if any incorrect information was submitted to the trial court at the time of the Petitioner's arraignment and sentencing this fact was also known to the Petitioner at such time. Were ignorance of the case law to constitute an excuse sufficient to avoid the sanctions of Rule 9(b), supra, it is clear that a Federal habeas applicant could continue to file applications on a piece-meal basis whenever he became aware of additional grounds for relief. Such a result is directly contrary to the policy against piece-meal litigation embodied in Rule 9(b). Therefore, I would find that the Petitioner's failure to have raised these grounds in a prior application constitutes an abuse of the Writ.

Alternatively, the Respondent urges that Petitioner's application be dismissed pursuant to Rule 9(a) on the basis that he has been prejudiced in his ability to refute the grounds raised by the Petitioner. The Respondent's pleadings in their present form are insufficient to demonstrate prejudice. The Respondent has failed to file any affidavits or other documents from which it can reasonably be concluded that he is unable to respond to the Petitioner's grounds. The mere passage of time is insufficient to establish a basis for dismissal pursuant to Rule 9(a). Mixon v. United States, 608 F.2d 588 (5th Cir. 1979), vacated on other grounds 620 F.2d 486. Therefore, I find that the Respondent has not presently demonstrated prejudice and his Motion to Dismiss pursuant to Rule 9(a) should be overruled.

In the alternative if the merits of Petitioner's application

and further that it had before it erroneous information concerning other acts and conduct of the Petitioner, the Petitioner has failed to demonstrate prejudice, and therefore no constitutional violation has occurred. The record and the prior findings of this court and the Fifth Circuit unequivocally establish that Petitioner's pleas of guilty were voluntarily and knowingly entered in return for a plea bargain in which he would be sentenced to terms of twenty years on each conviction to run concurrently. The Petitioner has received precisely what he bargained for and has thus failed to establish any prejudice predicated on consideration, if any, of erroneous information.

RECOMMENDATION:

For the foregoing reasons it is recommended that Petitioner's application be dismissed pursuant to Rule 9(b) of the Rules Governing §2254 Cases. In the alternative, if Petitioner's application not be dismissed under Rule 9(b), supra, it is recommended that the Respondent's Motion to Dismiss pursuant to Rule 9(a) of the Rules Governing §2254 Cases be overruled and denied. It is further recommended that if the merits of Petitioner's application be reached that the application be denied and dismissed.

Wm. F. Bankston, Jr.
UNITED STATES MAGISTRATE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 13 1980
JOSEPH McELROY, CLERK
BY Jane O'Neal Deputy

JAMES EDWARD CLAYTON)
)
)
VS.) CIVIL ACTION NO. CA3-80-760-D
)
W. J. ESTELLE, DIRECTOR, TDC)
)
)

A notice of appeal has been filed in the subject proceeding. Pursuant to the provisions of Rule 22(b), Federal Rules of Appellate Procedure, I recommend that a certificate of probable cause be (~~granted~~)(denied). Recommendation of denial, if made, is based on the following reasons: Petitioner is guilty of an abuse of the writ and his application was properly dismissed under Rule 9(b) for the reasons set out in the magistrate's recommendation filed on September 5, 1980. See also United States v. Montgomery, 628 F.2d 414, 416 (5th Cir. Unit A, 1980). I therefore recommend that Petitioner not be permitted to proceed in forma pauperis on appeal.

Date: November 12, 1980

Wm. T. Hamilton Jr.
UNITED STATES MAGISTRATE

ORDER OF THE COURT ON THE FOREGOING RECOMMENDATION:

After a review of the files and records of the case and the recommendation of the Magistrate, I find that a certificate of probable cause should be ~~(granted)~~ (denied). IT IS SO ORDERED. The reasons for denial of a certificate of probable cause, if such is denied, are as follows:

For the reasons stated above.

Date: Nov. 13, 1980

R. A. Hall
UNITED STATES DISTRICT JUDGE

(The Clerk is required to transmit this statement or certificate with / Letter to ~~XXXX

APPENDIX D
Page 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-9026

U.S. COURT OF APPEALS
FILED
MAR 11 1981
GILBERT F. GANUCHEAU
CLERK

JAMES EDWARD CLAYTON,

Petitioner,

VERSUS

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

- - - - -

On Application for Certificate of Probable Cause

- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause is denied.

UNITED STATES CIRCUIT JUDGE

OFFICE OF THE CLERK
U. S. COURT OF APPEALS
FIFTH CIRCUIT

Date: Feb. 6, 1981

Re: Clayton v. Estelle
(USDC No. CA3-80-0760-D)

Receipt is acknowledged of your motion for an extension of time to file Certificate of Probable Cause. This is to advise that your motion is being treated as an application for a certificate of probable cause since there is no time limit for filing such application.

Appendix D-1 pg. 1

Very Truly Yours,
GILBERT F. GANUCHEAU
Clerk